UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

IN RE:

TRAVIS CLAYTON WILLIAMS &
CALLIE JETT WILLLIAMS,

Debtors.
_____/

CASE NO.: 17-10190-KKS
CHAPTER: 7

SOUTHEASTERN FUNDING
PARTNERS, LLLP

Plaintiff,
v.

TRAVIS CLAYTON WILLIAMS &
CALLIE JETT WILLIAMS,

Defendants.
_____/

ADV. NO. 18-01002-KKS

ORDER DENYING *DEFENDANT'S MOTION TO DISMISS THIRD AMENDED COMPLAINT* (DOC. 46)

THIS MATTER is before the Court on *Defendant's Motion to Dismiss Third Amended Complaint* ("Motion to Dismiss," Doc. 46) and memorandum of law (Doc. 47), and Plaintiff's memorandum of law in opposition to the Motion to Dismiss ("Response," Doc. 50).

BACKGROUND

On April 3, 2018, Plaintiff, Southeastern Funding Partners, LLLP

("SFP"), commenced this adversary proceeding by filing a five-Count Complaint ("First Complaint").[1] On July 20, 2018, Defendants filed their First Motion to Dismiss, which the Court granted in part.[2]

On August 6, 2018, SFP filed its Second Amended Complaint and a Motion for Leave to Amend.[3] Defendants again moved to dismiss;[4] the Court dismissed Counts I, II, III, and V with prejudice, and Count IV without prejudice, as to Ms. Williams, and all counts without prejudice as to Mr. Williams.[5]

The current Motion to Dismiss is addressed to the Third Amended Complaint SFP filed on January 7, 2019.[6]

DISCUSSION

Motion to Dismiss Standard

In addressing a motion to dismiss, the Court must accept the factual allegations in a complaint as true, and take them in the light most favorable to the plaintiff.[7] To survive a motion to dismiss, a complaint

[1] Doc. 1.
[2] Docs. 18; 32.
[3] Docs. 26 and 27.
[4] Doc. 36.
[5] Doc. 43.
[6] Doc. 45.
[7] *Erickson v. Pardus*, 551 U.S. 89 (2007).

must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[8] This standard "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[9] Thus, the Court engages in a two-step approach: "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[10]

As to all Counts

In its previous orders, the Court noted that if pled properly, "it appear[ed] Plaintiff may have enough facts to give rise to causes of action in each Count as to Mr. Williams."[11] Taking the factual allegations in SFP's Third Amended Complaint as true and in a light most favorable to SFP, the Motion is due to be denied.

In his Motion to Dismiss, Defendant asserts that the Third Amended Complaint exemplifies shotgun pleadings. The Court disagrees. In its orders dismissing SFP's first two complaints, the Court noted that SFP's allegations were oftentimes not connected to the causes

[8] Fed. R. Civ. P. 8(a)(2), made applicable by Fed. R. Bankr. P. 7008.
[9] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted).
[10] *Id.* at 679.
[11] Doc. 43. at p. 6.

of action, making it impossible to understand which facts were applicable to what count.[12] This is not the case in the Third Amended Complaint.

In general, paragraphs 1 through 10 of the Third Amended Complaint set forth jurisdiction, venue, and information about the case, the parties, and the non-debtor entities; paragraphs 11 through 16 provide information regarding the loans at issue; while paragraphs 17 through 22 provide information regarding Defendant's gambling activities. In Count I of its Third Amended Complaint, SFP re-alleges paragraphs 1 through 22, all of which are relevant to the cause of action pled. SFP does the same in Count II. In Count III, SFP re-alleges paragraphs 1 through 10 and 17 through 22, all relevant to the cause of action pled in that Count. This also holds true for Count IV.

COUNT I – DECLARATORY JUDGMENT

In Count I of the Third Amended Complaint, SFP seeks a declaratory judgment that: 1) Defendant is the alter-ego of two entities, Innovative Home Builders of North Florida, Inc. ("Innovative") and IHB Holdings, LLC ("IHB," collectively, "IHB Entities"), and "vice versa;" 2) the corporate veil should be pierced between Defendant and the IHB

[12] *See* Docs. 32 and 43.

Entities; and 3) Defendant is liable for the IHB Entities' debt to SFP.

To make a finding of alter-ego and piece the corporate veil in Florida:

> "Plaintiffs have the heavy burden to prove by a preponderance of the evidence that: 1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence was in fact non-existent and the shareholder was in fact the alter-ego of the corporation; 2) the corporate form must have been used fraudulently or for an improper purpose; and 3) the fraudulent or improper use of the corporate form caused injury to the claimant."[13]

Taking the allegations in Count I as true and viewing them in a light most favorable to SFP, it appears SFP has plead enough facts to plausibly give rise to an alter-ego cause of action under the above criteria.

Defendant cites *In re Molinos* in support of his argument that Count I should be dismissed because, in his words, a plaintiff cannot pierce the corporate veil of a non-shareholder director.[14] Defendant's argument on this point may be raised as an affirmative defense to Count I but is not sufficient at this stage to dismiss Count I as it is now pled.

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[13] *In re Cannon*, Case No. 12-10462-KKS, 2017 WL 3491804 at *3 (Bankr. N.D. Fla. Jun. 6, 2017).

[14] *Molinos Valle Del Cibao, C. Por A v. Lama*, 633 F.3d 1330 (11th Cir. 2011).

Defendant also argues that Count I should be dismissed because SFP did not join the IHB Entities, claiming that said entities are indispensable and necessary parties to this action. In response, SFP argues that Defendant has not met his burden under Rule 19 of the Federal Rules of Civil Procedure to show that joinder of the IHB Entities is necessary.[15] SFP is correct.

The Motion to Dismiss is devoid of a Rule 19 analysis. "On a motion to join an indispensable party, the burden is on the movant to demonstrate why that party is required."[16] Defendant has failed to allege or show that in the absence of the IHB Entities the Court "cannot accord complete relief among existing parties" or that the IHB entities "claim an interest relating to the subject of the action," as required by Rule 19. Such a showing would be virtually impossible, in that SFP seeks relief in the form of non-dischargeability of debt and objection to discharge, neither of which would be applicable to the IHB Entities. Accordingly, the Motion to Dismiss is due to be denied as to Count I.

[15] Fed. R. Bankr. P. 7019 makes Fed. R. Civ. P. 19 applicable. *See Molinos, infra.* (the burden is on the movant to show that joinder of a party is necessary).
[16] *Joe Hand Promotions, Inc. v. Sorata*, Case No.: 11-80985-CIV, 2012 WL 2414035, at *5 (S.D. Fla. June 26, 2012).

COUNT II – OBJECTION TO DISCHARGE [SIC] – 11. U.S.C. § 523(a)(2)(A)[17]

In Count II, SFP objects to the dischargeability of its debt under 11 U.S.C. § 523(a)(2)(A), alleging that Defendant and the IHB Entities obtained money through false representation or other materially deceptive conduct with the intent to deceive SFP. Defendant claims SFP fails to allege what facts show that its reliance on Defendant's alleged false representation was justifiable. In response, SFP contends that its Third Amended Complaint sufficiently alleges fraudulent conduct by Defendant with the level of particularity required under Rule 9 of the Federal Rules of Civil Procedure and that justifiable reliance is a question of fact for trial.

To assert a claim under § 523(a)(2)(A), a party must allege: the defendant made a false representation, or engaged in other materially deceptive conduct, with intent to deceive; and the party 2) relied on the misrepresentation/deceptive conduct; 3) its reliance was reasonably justified under the circumstances; and 4) it sustained a loss as a result of

[17] This Court previously noted SFP's incorrect labeling of this Count as an objection to discharge as opposed to dischargeability of debt. Doc. 32. at p. 9.

the fraud/deception.[18] "Under § 523(a)(2)(A), justifiable reliance allows 'a plaintiff to rely unequivocally on a representation or promise made by a debtor, without investigating the truth of the representation or promise, unless the statement is patently false'" and that "negligence on the creditor's part is not a defense to intentional misrepresentation."[19]

In its Third Amended Complaint, SFP alleges that Defendant affirmatively represented that loans from SFP would be used solely for purchasing real estate and building houses. SFP further alleges that instead, Defendant, "knowingly and intentionally" used the money borrowed to gamble and for other unknown and unexplained purposes. SFP asserts that it justifiably relied on Defendant's alleged misrepresentations. Under the applicable caselaw in this District, whether that is true will be a matter of fact to be proven at trial or some other stage of this adversary proceeding.

Taking SFP's allegations in Count II as true and viewing them in a light most favorable to SFP, Count II asserts a plausible basis for relief

[18] *In re Roberts*, 17-30408-KKS, 2018 WL 6728412, at *5 (Bankr. N.D. Fla. Dec. 20, 2018).
[19] *In re McDowell*, 22 CBN 707, 2012 WL 1569630, at *4 (Bankr. N.D. Fla. May 3, 2012) (citation omitted). Justifiable reliance requires a subjective standard, that is, "the [c]ourt must take into account a plaintiff's particular 'qualities and characteristics.' The justifiable reliance inquiry is essentially a 'facts and circumstances' test of the particular case and particular creditor." *In re Moran*, 413 B.R. 168, 182 (Bankr. D. Del. 2009).

under 11 U.S.C. § 523(a)(2)(A). For this reason, the Motion to Dismiss is due to be denied as to Count II.

COUNT III – OBJECTION TO DISCHARGE – 11 U.S.C. § 727(a)(4)(A)

In Count III, SFP claims that Defendant's discharge should be denied under 11 U.S.C. § 727(a)(4)(A) on the basis that Defendant provided false oaths with respect to the nature and extent of his gambling activities and losses. SFP attached the Rule 2004 examination transcript as an exhibit and included relevant excerpts from that transcript in this Count. SFP sets forth specific testimony given by Defendant regarding his gambling. SFP claims that Defendant concealed his gambling losses in testimony in this case, and such concealment is material to the bankruptcy case because it involves money lent by creditors of the Estate and affects SFP's [and other creditors' and the Trustee's] ability to understand Defendant's financial affairs.

Taking these allegations as true and viewing them in a light most favorable to SFP, Count III asserts a plausible basis for relief under 11 U.S.C. § 727(a)(4)(A). For this reason, the Motion to Dismiss is due to be denied as to Count III.

COUNT IV – OBJECTION TO DISCHARGE – 11 U.S.C. § 727(A)(5)

In Count IV, SFP objects to Defendant's discharge under 11 U.S.C. § 727(A)(5), alleging that Defendant failed to satisfactorily explain the dissipation of assets, comprised of over $3.7 million that SFP loaned and that it alleges Defendant controlled through his domination of the IHB Entities. In the Motion to Dismiss, Defendant asserts that Count IV fails to state a cause of action because SFP does not allege that assets owned by Defendant were dissipated. Here, Defendant misstates or misreads Section 727(a)(5), which provides:

> (a) The court shall grant the debtor a discharge, unless—
> …
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;
> … .[20]

This section does not state "any loss of the debtor's assets," as Defendant suggests.

SFP appropriately cites *In re Sklarin* in support of Count IV and in opposition to the Motion to Dismiss.[21] In *Sklarin*, after a trial the

[20] 11 U.S.C. § 727(a)(5).
[21] *In re Sklarin*, 69 B.R. 949 (Bankr. S.D. Fla).

bankruptcy court found that the individual debtor and two corporations were alter egos of one another and held that the debtor "knowingly and fraudulently made a false oath in connection with the bankruptcy proceedings when the Debtor, under penalty of perjury, certified his sworn Statement of Assets and Liabilities to be true and correct when the Debtor omitted in said Statement the assets and property of [the corporate entities] as property of the Debtor."[22] In so doing, the court, quoting from and citing other cases, stated:

> "It is well established that property of the Debtor in the possession, custody and control of its alter ego comprises property of the estate at the commencement of the case," and that bankruptcy courts have the power to disregard separate corporate entities so as to reach the assets of its non-debtor alter ego to satisfy debts of the Debtor." … It is also a settled principle of law that
>
> " 'When one legal entity is but an instrumentality or alter ego of another, by which it is dominated, a court may look beyond form to substance and may disregard the theory of distinct legal entities in determining ownership of assets in a bankruptcy proceeding.' "[23]

Taking SFP's allegations as true and viewing them in a light most favorable to SFP, Count IV alleges a plausible basis for relief under 11

[22] *Id.* at 954-55.
[23] *Ibid.* at 954 (citations omitted).

U.S.C. § 727(a)(5). For this reason, the Motion to Dismiss is due to be denied as to Count IV.

For the reasons stated, it is

ORDERED:

1. *Defendant's Motion to Dismiss Third Amended Complaint* (Doc. 46) is DENIED.
2. Defendant shall have twenty-one (21) days from the date of this Order within which to serve and file an answer to the Third Amended Complaint.
3. The hearing currently scheduled for February 28, 2019 is cancelled.

DONE and ORDERED on February 27, 2019.

KAREN K. SPECIE
Chief U. S. Bankruptcy Judge

Defendant's attorney is directed to serve a copy of this Order on interested parties and to file a Proof of Service within three (3) days of entry of this Order.